IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1258

STATE OF MINNESOTA, BY WARREN SPANNAUS, ITS ATTORNEY GENERAL,

Petitioner,

vs.

FIRST OF OMAHA SERVICE CORPORATION and THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS,

Respondents.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF OF PETITIONER

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BRIEF OF PETITIONER

Petitioner State of Minnesota appeals from the judgment of the Supreme Court of Minnesota which was entered on December 14, 1977, reversing the judgment of the Hennepin County District Court and invalidating on federal supremacy grounds Minnesota's interest limit on bank credit card accounts as applied to foreign national banks which engaged in the bank credit card business in Minnesota.

OPINIONS BELOW

The opinion of the Hennepin County District Court is unreported and reproduced in full in the Joint Appendix at App. 123a.[1] The opinion of the Minnesota Supreme Court reported at 262 N.W.2d 358 (1977) and its unreported order denying rehearing are reproduced in full at App. 155a and App. 197a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) to review the judgment of the Minnesota Supreme Court entered on December 14, 1977 (App. 198a). Judgment was entered pursuant to the Court's Order of December 8, 1977, denying the petition for rehearing of the Marquette National Bank of Minneapolis.

A petition for certiorari was filed with this Court on March 13, 1978. The Court granted certiorari on May 22, 1978, and ordered the matter consolidated for hearing with the appeal from the same decision filed by the Marquette National Bank of Minneapolis, No. 77-1265.

QUESTION PRESENTED FOR REVIEW

Does 12 U.S.C. § 85 of the National Bank Act preempt Minnesota's 12% annual interest limit on open-end bank credit accounts so that a Nebraska national bank systematically soliciting Minnesota residents can charge those residents the 18% annual interest rate allowed on such accounts by the laws of Nebraska while all local state and national banks are limited to the 12% maximum rate prescribed by Minn. Stat. § 48.185 (1976)?

[1] "App." refers to the Joint Appendix filed for this appeal and the consolidated case of Marquette National Bank of Minneapolis v. First of Omaha Service Corporation, No. 77-1265.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is the supremacy clause, Article VI, Clause 2, of the United States Constitution, which states in pertinent part:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

The pertinent statutory provisions are:

12 U.S.C. § 85 (Addendum 1) and Minn. Stat. § 48.185 (1976) (Addendum 2).

STATEMENT OF THE CASE

The State of Minnesota, by its Attorney General, and the Marquette National Bank of Minneapolis (hereinafter "Marquette") are the petitioners in these consolidated actions. Marquette is a national bank located in Minnesota which operates a BankAmericard bank credit card program. Respondent First of Omaha Service Corporation (hereinafter "Service Corporation") is a wholly-owned subsidiary of the First National Bank of Omaha (hereinafter "Omaha Bank"), a national bank located in Nebraska. Like Marquette the Omaha Bank operates a BankAmericard bank credit card program, and its Service Corporation, which is registered as a foreign corporation in Minnesota, solicited Minnesota residents for the program until enjoined by the district court below.

Petitioner Marquette commenced this action in May, 1976, to enjoin the Service Corporation and the Omaha Bank from further solicitation of Minnesota residents and from charging Minnesota residents already enrolled in the Omaha Bank's bank credit card program interest at the Nebraska rate of 18% per annum. Marquette urged that Minn. Stat. § 48.185 (1976) limits the Omaha Bank's and the Marquette's Bank-Americard programs within Minnesota to a maximum charge of 12% per annum on unpaid account balances. The Service Corporation maintained that Minn. Stat. § 48.185 (1976)[2] is preempted by section 85[3] of the National Bank Act because the federal act allegedly authorizes an out-of-state national bank operating a bank credit card program in Minnesota to charge either the Minnesota rate permitted under section 48.185 or the applicable interest rate of its home state, whichever is higher. The State of Minnesota became an intervenor in this proceeding since a state law (section 48.185) was under constitutional attack by the Service Corporation.

On December 22, 1976, the state district court rejected the preemption claim and temporarily enjoined the Service Corporation from violating section 48.185. A permanent injunction was entered on February 18, 1977. The Service Corporation then appealed to the Minnesota Supreme Court. On November 10, 1977, the Minnesota Supreme Court with three justices dissenting reluctantly reversed the district court, holding that the Omaha Bank should be allowed to assess its Minnesota customers the higher Nebraska rate. This ruling leaves an out-of-state national bank free to charge a higher interest rate to Minnesota customers than that allowed a state or national bank located in Minnesota. In its decision, the Minnesota

[2] Addendum 2.
[3] Addendum 1.

Supreme Court acknowledged that this was an advantage that "appears to be contrary to the original purpose in adopting this particular section [section 85] of the National Bank Act." *Marquette National Bank v. First of Omaha Service Corporation*, —— Minn. ——, 262 N.W.2d 358, 365 (App. 155a). However, the Court felt constrained to reach the decision it did by the decision of the 8th Circuit Court of Appeals in *Fisher v. First National Bank of Omaha*, 548 F.2d 255 (8th Cir. 1977).

SUMMARY OF ARGUMENT

The State of Minnesota argues that a Nebraska national bank must abide by the Minnesota usury law when it enters the state and solicits its residents for credit card accounts. This is the same law which applies to resident national and state banks.

The rate of interest a national bank may charge on a loan is governed by section 85 of the National Bank Act which, in its pertinent provisions, has remained virtually unchanged since its enactment in 1864. How the interest rate language of section 85 is to be interpreted is the critical question in this case.

Against respondent's claim that section 85 should be interpreted so as to preempt the applicable Minnesota usury law, the State of Minnesota demonstrates that Congress never intended to permit a bank from one state to export its state usury law to another state in order to obtain a competitive advantage. Although the literal wording of section 85 states that any loan by a national bank is governed by the law of the state in which the bank is located, a "plain meaning" interpretation of this section in the present context should be rejected because the Civil War Congress which enacted it sought to establish parity in interest limits between national banks and state

banks by leaving national banks subject to the local usury laws in effect in each state.

In adopting section 85, Congress was addressing a banking system in which banks made loans by handing their bank notes over the counter or by crediting the borrower's account at the bank. Banks did not travel to foreign states soliciting consumer customers; interstate open-end credit credit transactions were not contemplated. Congress thus has never addressed the question of which usury law governs a national bank when it enters another state to solicit loans. However, the Congressional policy expressed in the legislative debates leading to the enactment of section 85 reflect a policy of deference to local money market conditions as reflected in the usury laws of the several states.

The states have traditionally regulated national and state banks doing business within their communities. In particular, protection of the public by the setting of usury limits has long been a state concern, and Congress acquiesced in this local control when it refused to adopt a uniform interest rate for all national banks in 1864. Congress has done nothing since that time to reserve that power to itself.

Congress decided that a healthy national banking system could best be encouraged by assuring national banks the same interest limitations which governed competing lenders in each locality in which the new banking institutions were established. This policy would best be served by interpreting section 85, in the context of national bank loans in a foreign state, as incorporating the local usury laws which govern local national banks and other lenders in that state. Such an interpretation would also be consistent with the general practice for over a century of holding national banks accountable to non-discriminatory state regulation.

ARGUMENT

I. INASMUCH AS BANKING HISTORICALLY HAS BEEN SUBJECT TO A DUAL STATE AND FEDERAL SYSTEM OF REGULATION, STATE BANKING LAWS ARE VALID UNLESS THEY FRUSTRATE THE ESSENTIAL PURPOSE OF FEDERAL REGULATION.

A. Standards of Preemption Favor Preservation of State Authority.

In 1963, this Court established its well known two-part test to determine whether a federal law should preempt a valid state law. In *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), the Court held that a state law was not preempted by federal law unless one of two persuasive reasons was demonstrably present: (1) that the nature of the regulated subject matter permitted no other conclusion than preemption; or 2) that Congress had unmistakably ordained that the field was preempted.

Since *Florida Lime*, this Court has expanded and clarified its policy that valid regulatory interests of the states are not easily to be preempted. In fact, the Court has consistently applied a strong presumption in favor of validating state laws challenged on preemption grounds.

> If Congress is authorized to act in a field, it should manifest its intention clearly. *It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.*

New York State Dept. of Social Services v. Dublino, 413 U.S. 405, 413 (1973) (emphasis added).

Illustrative of this concern for the rights of state governments are *DeCanas v. Bica*, 424 U.S. 351 (1976) and *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). In *DeCanas*, the California courts ruled that a state law providing that no employer could knowingly employ an illegal alien was preempted by the Comprehensive Federal Immigration and Nationality Act, 8 U.S.C. §1101, *et seq.* In reversing the state court, the Court sustained the state law even though it admittedly impinged on the traditional federal area of regulation of aliens. In doing so, the Court observed:

> Only a demonstration that complete ouster of state power —including state power to promulgate laws not in conflict with federal law—was 'the clear and manifest purpose of Congress' would justify [preemption].[4]

424 U.S. at 357.

That a state may be free to enact legislation in areas where Congress has already acted, was most recently reaffirmed in *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

> Where, as here, the field which Congress is said to have pre-empted has been traditionally occupied by the States . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . . This assumption provides assurance that, '*The federal-state balance * * * will not be disturbed unintentionally by Congress or unnecessarily by the courts.*'

[4] Accord, e.g., Malone v. White Motor Corp., 46 U.S.L.W. 4295 (April 3, 1978) (upholding Minnesota Private Pension Benefit Act against claim of preemption by National Labor Relations Act); Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974) (upholding state trade secret law against claim of preemption by federal patent laws); Goldstein v. California, 412 U.S. 546 (1973) (upholding a state law making it a criminal offense to "pirate" recordings against claim of preemption by copyright clause of United States Constitution.)

disturbed unintentionally by Congress or unnecessarily by the courts.'

430 U.S. at 525.

Jones also emphasized that preemption claims require careful analysis of state and federal policies. The relationship between the federal and state laws as they are interpreted and applied is as important as the explicit statutory language. *Jones v. Rath Packing Co., supra*, 430 U.S. at 525-526, 540-541.[5] Unless, under the circumstances of the case, the state's law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"[6] there is no need to find preemption.

When the legislative history of section 85 is considered [*infra* at Argument III], there can be little doubt that Congress did not intend by the language contained therein to preempt the field of state interest rate regulation. Contrary to respondent's assertion there is no clear Congressional expression of preemption in the federal statute at issue here as required by *Florida Lime*. Neither is it true that the nature of the regulated area, state interest rates, is such that the subject matter permits no other conclusion than use of federal preemption, *Florida Lime & Avocado Growers, Inc., supra*.

It is submitted that Minn. Stat. § 48.185 (1976) does not

[5] See also Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 127 (1973) in which the Court stated:

> [C]onflicting law absent repealing or exclusivity provisions, should be pre-empted . . . only to the extent necessary to protect the achievement of the aims of the federal law, since the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding [the state scheme] completely ousted.

[6] Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

stand as an obstacle to the execution and accomplishment of the full purposes and objectives of Congress when it enacted section 85. Since the time that section was first adopted it has been federal policy that national banks compete for loans on an even footing with local banks.

Certainly, there is no evidence that Congress intended otherwise. It is noteworthy that Congress has never acted to overturn the long-standing holding of this Court that "national banks are subject to the laws of a state in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies, or conflict with the paramount law of the United States." *First National Bank in St. Louis v. Missouri*, 263 U.S. 656 (1923).

B. It Is Well Known That State Laws Have Traditionally Been Held Applicable To National Banks In Many Aspects Of Their Business, A Situation Which Congress Has Never Seen Fit To Alter By Amendment To The National Bank Act.

Congress is fully aware that the states have reserved to themselves certain regulatory powers over national banks. This fact has been repeatedly made clear by the many statutes and cases which have so held. For example, in *First National Bank v. Walker Bank*, 385 U.S. 252, 259 (1966), the Court, in examining the Congressional history of § 36(c) of the National Bank Act decided that national banks would be permitted branches "only in those States and to the extent that State laws permit branch banking."[7]

[7] In the Walker case, the Court examined the history of § 36(c) of the National Bank Act and stated:

> It is not for us to so construe the acts to frustrate this clear-cut purpose so forcefuly expressed by both friend and foe of the legislation at the time of its adoption. To us it appears beyond question that the Congress was *continuing its policy of equalization first adopted in the National Bank Act of 1864.*

385 U.S. at 261 (emphasis added). Section 36(c) had a parallel history to the adoption of § 85, with extensive debates and the final compromise between the opposing sides, resulting in leaving the issue of whether or not branches would be permitted to the discretion of the individual states.

This Court has also determined that national banks are subject to state laws in the area of escheat laws, *Anderson v. Luckett*, 321 U.S. 233 (1944); that national banks are subject to state laws requiring all banks to submit to the state for taxing purposes a list of stockholders' names, number of shares and money actually paid on the shares even though there is a federal law already requiring a posting at the bank of all shareholders' names, *Waite v. Dowley*, 94 U.S. 527 (1877); that national banks are subject to state laws requiring that as a depository of state funds, a national bank became subject to a state law requiring the giving of a security bond for double the amount of the deposit, *Lewis v. Fidelity & Deposit Co.*, 292 U.S. 559 (1934),[8] and that national banks are

[8] The Court also held that when the national bank became insolvent, the bonding company as successor to the state's interest, had a general lien on the assets of the national bank wherever banks organized under the laws of that state had that same power. This result was necessary in order to achieve Congress' purpose of placing national and state banks in a position of competitive equality. In giving the Court's opinion, Justice Brandeis stated:

> For the main purpose of the 1930 [Bank] Act was to *equalize the position of national and state banks*; and without such power [to act as depository of state funds upon the pledging of a general lien] national banks would not in Georgia be upon an equality with state banks in competing for deposits. *The policy of equalization was adopted in the National Bank Act of 1864 and has ever since been applied,* in the provision concerning taxation; in the amendments to that Act and in the Federal Reserve Act and amendments thereto the policy is expressed in provisions conferring power to establish branches; in those conferring power to act as fiduciary; in those concerning interest on deposits; and in those concerning capitalization.

292 U.S. at 564-565.

subject to a state's laws regarding the compounding of interest. *Citizens' National Bank v. Donnell,* 195 U.S. 369 (1904).

Similar issues have been addressed by Circuit and District Courts. In *American Timber & Trading Co. v. First National Bank,* 511 F.2d 980 (1973), the Court held that a national bank could not compute interest at a rate which would be usurious under state law. In *First National Bank in Mena v. Nowlin,* 509 F.2d 872 (1975), the Court held that a state law prohibiting the discounting of loans at the maximum state interest rate, where discounting resulted in a loan yield in excess of the maximum state interest rate, would be applied to a national bank's loan transactions.

Finally, in *Meadow Brook National Bank v. Recile,* 302 F. Supp. 62 (E.D. La., 1969), the federal District Court was faced with a question almost identical with the one at bar. The transaction occurred in Louisiana between a New York national bank and a Louisiana citizen. In holding that the applicable law was that of Louisiana, the Court concluded that section 85 fixed the rate of interest only in the state in which the national bank was located; it does not govern transactions by a national bank in other states. Instead, these foreign transactions are governed by the interest rates fixed by the state in which the transaction occurs. The Court felt that this was the best way in which to effectuate the purpose of the National Bank Act, *i.e.,* to give competitive equality to national banks.

All of these cases are demonstrative of the great extent to which national banks are subject to state regulation. Congress has purposely acquiesced in this regulatory relationship so that, in so far as government supervision is concerned, all banks in a given market area would be on an equal competitive footing. Yet, respondent's interpretation of section 85 would

tip the competitive balance in its favor. It urges in effect that Congress intended to permit national banks to roam the country's market places free of the regulatory limitations which restrain the local competition. However, this position is hardly harmonious with the principle of local regulatory equality; it is almost certain to inhibit the benefits that flow from robust but fair competition in an open market place.

Preemption takes place when Congress determines that there should be national uniformity within the given regulatory area. Yet respondent's position would impute to Congress an intention just the opposite of uniformity. Taken to its logical conclusion, respondents claim that Congress intends that there could be up to 50 different interest rates charged for the same credit card transactions in Minnesota. Surely, the rules governing preemption do not require that Minnesota's usury rates be replaced in Minnesota, through the vehicle of section 85 with the State of Nebraska's interest rates.

Thus, applying the Court's criteria for determining preemption, and considering the historical subjection of national banks to the regulations of the states where the banks do business, section 85 should be construed so as to uphold Minn. Stat. § 48.185.

II. PROTECTION OF ITS CITIZENS FROM USURIOUS INTEREST CHARGES IS A TRADITIONAL EXERCISE OF A STATE'S POLICE POWERS WHICH HAS LONG BEEN RECOGNIZED BY CONGRESS AND THIS COURT.

Rates of interest for banking and commercial transactions have traditionaly been governed locally. The legislatures of each of the 50 states have in force interest rate regulations

for various transactions.[9] Minnesota has shown for many years its strong concern about interest rates. The earliest Minnesota usury statutes were modeled after earlier New York and English statutes. *Jordan v. Humphrey,* 31 Minn. 495, 497 (1884).[10] Minnesota's legislature in recent years has passed usury statutes dealing with several types of credit transactions.[11] Annually, bills have been introduced in the legislature to raise the interest rate on credit card transactions from 12 percent to 18 percent. The failure of these bills demonstrates the strong belief of this state in a 12 percent limit on interest charged in retail credit transactions by consumers.

As explained in detail [*infra* at Argument III], the Civil War Congress which debated what is now section 85 rejected a uniform national usury rate for national banks in favor of state-by-state regulation. Judge Kantorowicz of the Hennepin County District Court, in his opinion enjoining respondent Service Corporation from charging Nebraska's higher interest rate, relied heavily on the history of Congressional deference to state legislation in this area:

> Since the founding of our republic, congress, by its legislation, has allowed states to set their own interest rates. . . . To take a statute that has been on the books for almost 100 years and find in that law an intention, in 1976, to nullify a financial practice of 200 years stand-

[9] Table of interest rates for 50 states—1 Consumer Credit Guide (CCH) § 510 (1978).

[10] The severe forfeiture provisions of the early Minnesota usury statutes were upheld in Missouri, Kansas & Texas Trust Co. v. Krumseig, 152 U.S. 351 (1899).

[11] Many sections of Minnesota statutes contain specific interest rates and specific methods of calculating interest. Examples would be Minn. Stat. §§ 334.011 (agricultural loan statute adopted in 1976); 334.16-334.181 (consumer credit statute adopted in 1971); 47.20 (conventional mortgage statute, adopted in 1976) to mention just a few.

> ing is ludicrous and makes a mockery of the doctrine of legislative intent. If there be any intent in Congress it must be to preserve the financial customs of so long a standing in our Republic.[12]

This Court early recognized the primacy of state interest rate regulation in the affairs of national banks. In refusing to review an Illinois court's application of state usury law to a national bank, the Court emphasized that the National Bank Act did no more than protect national banks from discriminatory state legislation:

> [T]he true construction of state legislation is a matter of state jurisprudence, and, while the right of the national bank springs from the act of Congress, yet it is only a right to have an equal administration of the rule established by state law. It does not involve a reservation to the national courts of the authority to determine adversely to the state courts what is the rule as to interest prescribed by the state law, but only to see that such rule is equally enforced in favor of national banks.

Union National Bank v. Louisville R.R., 163 U.S. 325, 331 (1896) (citations omitted.) Thus, the authority to regulate interest rates, including the interest rates charged by national banks, has consistently been recognized as a matter for state control.

[12] Findings of Fact, Conclusions of Law, and Order for Partial Summary Judgment of the Hennepin County District Court (No. 726526, Feb. 10, 1977), at App. 123a.

III. THE CIVIL WAR CONGRESS WHICH ENACTED SECTION 85 WAS ADDRESSING A FINANCIAL SYSTEM IN WHICH INCORPORATED BANKS DID NOT TRANSACT BUSINESS OUTSIDE THEIR HOME STATE, AND THUS COULD NOT HAVE CONTEMPLATED SUCH BUSINESS. HOWEVER, THE CONGRESSIONAL DEBATES ON SECTION 85 DISCLOSE A POLICY OF PLACING NATIONAL BANKS IN PARITY WITH OTHER LENDERS OPERATING WITHIN EACH STATE. IN THE CONTEXT OF THE MODERN BANK CREDIT CARD BUSINESS, THIS POLICY MANDATES THAT EACH STATE DETERMINE THE INTEREST RATE FOR BANK LOAN TRANSACTIONS WITHIN ITS BORDERS.

An examination of both the history of banking in America and the debates surrounding the adoption of section 85, demonstrate that Congress always intended that banks doing business in a given state be bound by the same interest rate. As a necessary result, section 85 cannot be read to preempt Minnesota's usury limit and instead apply the interest limit of another state to Minnesota loan transactions.

A. The National Bank Act of 1864 Restricted National Banks to Transacting Business At One Location.

The pertinent provision of section 85 has remained virtually unchanged[13] since its enactment as section 30 of the National Bank Act of 1864. 13 Stat. 99, 108. The 1864 Act made clear that the newly authorized national banking institutions could

[13] The only change in the pertinent provision has been the addition of the phrase "or existing" in 1874. This addition is discussed *infra*, at 30.

transact business only at their home offices. Section 6 of the Act required a bank to designate in its organization certificate the "particular county and city, town or village" in which it was to operate. 13 Stat. 101 (1864). Section 8 of the Act specified that a bank's "usual business shall be transacted at an office or banking house specified in its organization certificate." 13 Stat. 102 (1864). As this Court recently noted in construing the venue provision of the Act, "[t]here can be little question . . . that at the time the 1864 Act was passed the activities of a national bank were restricted to one particular location." *Citizens & Southern National Bank v. Bougas*, —— U.S. ——, 98 S. Ct. 88, 93 (1977).

B. The Practices of Incorporated Banks in the Era Immediately Preceding Enactment of the National Banking System Supports the View that Congress Did Not Contemplate a National Bank Soliciting Customers and Entering Loan Agreements Outside of the State in Which It Was Established.

The banking system of the mid-nineteenth century bears little resemblance to America's present banking structure. From the dismantling of the Second Bank of the United States by the Jacksonians in the 1830's until the creation of the national banking system in the National Currency Act of 1863 and the National Bank Act of 1864, the federal government had no direct role in banking.[14] Banks incorporated under state law issued bank notes which served as the nation's cir-

[14] The federal government's influence on the monetary system during this period was confined to placement of government funds and requirements of payment in specie for money owed the government.

culating currency.[15] These banks engaged in the exchange of bank notes, short-term loans, discounting commercial notes, and very limited long-term investments. They were overshadowed in the lending business by merchants and by "private bankers." The merchants and private bankers engaged in a broad range of transactions, including interstate loans.[16] Incorporated banks were local institutions more limited in the scope of their banking practices. Available history does not indicate that incorporated banks issued loans other than at their own offices.[17] The private bankers could establish branches in all the commercial centers of the nation and thus enjoyed an advantage over incorporated banks which were either prohibited by state law from establishing any branches or, at most, permitted to establish branches within their home states. Redlich, *supra*, 72-73. Private bankers dominated the long-term credit market and played a strong role in both exchange dealings with English banks and domestic exchange. *Id.*, at 67-70.

In contrast, incorporated banks had a local or statewide orientation and their loan transactions were of an "over-the-counter" nature. A study done for the Comptroller of the Currency states:

Depositors could draw checks on their accounts, . . .

[15] More than 1500 state banks issued their own notes in the mid-nineteenth century. R. Robertson, *The Comptroller and Bank Supervision: A Historical Approach* (1968), 29.

[16] The interstate character of private loan transactions is illustrated by the two cases decided by this Court during the antebellum period which concerned application of usury laws to loans between parties in different states. Both cases involved private lenders. Miller v. Tiffany, 68 U.S. (1 Wall.) 298 (1863); and Andrews v. Pond, 38 U.S. (13 Pet.) 65 (1839).

[17] The rise of the private banking houses from merchants and stockbrokers around mid-century is described in detail in F. Redlich, *The Molding of American Banking: Men and Ideas (Part II, 1840-1910)* (1951), ch. XIV.

> [b]ut more often both individuals and business firms made payments in cash. Thus, when a bank officer made a loan, he either credited the borrower's checking account with the amount or, more frequently, handed over the proceeds of the loan in bank notes, which the borrower would then use to pay his workers or remove his other obligations.[18]

Similarly, a contemporary observer noted that city banks made loans by crediting the net proceeds of the loan to the account of the borrower at the bank.[19] The local orientation of incorporated banks was reinforced by the problems borrowers faced when they sought to make payment in notes of an out-of-town bank. Notes issued by Baltimore banks were accepted at a 1 to 2 percent discount in Washington, and Washington notes were likewise discounted in Balitmore.[20] Larger discounts were required on exchange of notes of Western banks.[21]

There are no parallels in the lending practices of mid-nineteenth century banks to the bank credit card account of today.[22] The Minnesota Act, as drawn in issue here, concerns "a continuous and systematic solicitation" of Minnesota residents for an open-end credit account by a foreign national bank. Minn. Stat. § 48.185, subd. 6 (1976). This kind of credit

[18] R. Robertson, *supra*, 15.

[19] C. Raguet, *A Treatise on Currency and Banking* (1839).

[20] R. Robertson, *supra*, 16.

[21] Discounts of up to 15 percent were demanded by New York banks redeeming notes of Western banks. See House debate on the redemption provisions of 1864 Act as summarized in J. Knox, *History of Banking in the United States* (1900), 240.

[22] Bank credit cards first appeared in this country in New York in 1951. They became widespread in California after the introduction of Bank Americard in 1959. Large scale use of the cards nationwide began in 1966. B. Klebaner, *Commercial Banking in the United States: A History* (1974), 171-172.

arrangement with residents of a distant state would have been difficult to imagine in an era of over-the-counter loans.

C. The Congressional Debates on Section 30 of the National Bank Act of 1864 Disclose the Congressional Policies of Leaving to Each State the Determination of the Maximum Interest to be Charged Within its Borders.

The Civil War created a need for a uniform national currency that could be freely issued and would be accepted for the purchases necessary to the Union's conduct of the war.[23] The National Currency Act of 1863 and the National Bank Act of 1864 set up the national banking system with the intention of establishing the notes of national banks as a uniform national currency. As the Congressional debates of 1864 illustrate, Congress was aware that new bank notes could not change the economic facts that incorporated banks were confined to local markets and their loans governed by diverse local circumstances. Accordingly, Congress deferred to local circumstances in rejecting a uniform interest rate for national banks and leaving the matter to state-by-state regulation.

The national banking system had been created by the National Currency Act of 1863. 12 Stat. 665 *et seq.* Section 46 of the Currency Act had provided that national banks could charge interest at the rate which the law in each state imputed to an agreement in the absence of an express interest provi-

[23] The Union's money problems are examined in B. Hammond. *Sovereignty and an Empty Purse: Banks and Politics in the Civil War* (1968).

sion.[24] In 1864, Congress considered proposed amendments to the 1863 Act,[25] including a proposal to establish a uniform national rate of interest for national banks.

The uniform rate proposal was favored by Representative Hooper of Massachusetts and Senator Sherman of Ohio, the sponsors of both the 1863 Act and the proposed amendments of 1864.[26] The opposing views on a uniform rate were voiced in the House debates of March, 1864. Stevens of Pennsylvania, Chairman of the Ways and Means Committee, argued in favor of a uniform rate because "it is for the purpose of equalizing the opportunities for investment everywhere." Cong. Globe, 38th Cong., 1st Sess. 1353 (1864). Blaine of Maine, arguing for an amendment which would have continued the effect of the 1863 provision, emphasized the different economic conditions between his home district and the district represented by Hooper of Massachusetts. He wanted national banks in

[24] Section 46 stated:

> That every association may take, reserve, receive, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, such rate of interest or discount as is for the time the established rate of interest for delay in the payment of money, in the absence of contract between the parties, by the laws of the several states.

12 Stat. 678-679 (1863).

[25] The amendments which gave rise to the greatest controversy appear to have been those concerning state taxation of national banks, apportionment of circulation among the states, and redemption of national bank notes by other national banks. See Knox, *supra*, ch. XIV.

[26] Hooper's view is expressed in floor de[illegible]s in Cong. Globe, 38th Cong., 1st Sess. 1257 (1864); Sherman [illegible] at 2126.

Maine to charge interest reflecting the economic situation in Maine:[27]

> But I say that representing, as I do, an agricultural and manufacturing district in the State of Maine, I should be ashamed to go home and look them in the face if by my vote they should be required hereafter, if they desire to borrow a dollar, to pay one-sixth more to the capitalists who live in my friend's district than they have ever been called upon to pay before; and every gentleman from New England who represents an agricultural and manufacturing district will be held to the same accountability.
>
> Now, if the committee will vote down the amendment offered by the chairman of the Committee of Ways and Means, we will stand just where we stood yesterday, leaving each State to regulate this thing just as it pleases. In Maine, we have already regulated it, fixing it at six percent. In New York it is seven percent. And we have had very large commercial connections with New York, and got along very comfortably and very prosperously with both. Let New York have her seven percent. Let Maine have her six percent. And if California wants her two percent, per month, let her have it.

Cong. Globe, *supra* at 1375-1376.

[27] One of the contemporary justifications proffered for interest regulation in an era marked by a laissez-faire outlook was that such regulations were "but legislative findings of fact as to the market value of money, issued to guide borrowers." Friedman, *The Usury Laws of Wisconsin: A Study in Legal and Social History*, 1963 Wis. L. Rev. 515, 520. Although the shortcomings of legislative findings as to market rates were appreciated at the time, the laws were considered useful because "both the market and legal rates of money differed widely from place to place." *Id.* This justification for usury laws, strange as it may seem today, may have had influence on the desire in Congress to leave interest regulations to state legislatures best apprised of local market conditions.

Deference to local economic conditions, argued by Blaine in defense of the low interest rates of Maine, was also favored by Cole of California in discussing the very high interest rates prevalent in his state. *Id.* at 1376. Cole argued that a uniform interest rate would not serve the primary goal of a strong uniform currency. A strong currency required strong national banks in all parts of the nation. If national banks in California were limited to the proposed uniform rate of 7% and could not charge the higher rates determined by the market, they would not attract capital and would not prosper. *Id.* Cole assailed the illogic of two prescribed rates of interest for banks in the same location, one for national banks and another for state banks:

> What is the consistency or propriety of having two rates of interest established by law in the same community? What is the benefit of having two systems of usury in the same State? Here, while a transaction with one individual is lawful, with another it is unlawful. There is a difference if done with one class from what there is if done with another. I cannot see any propriety in it.

Id.

The Blaine amendment passed on March 30, 1864,[28] but the entire bill was tabled on April 8 as a result of the dispute over state taxation of national bank capital.[29] The bill in its original form, with the uniform interest rate provision, was again introduced by Hooper on April 11. The interest provision was not debated further and the uniform rate provision was included in the bill adopted by the House on April 20.

[28] Cong. Globe, *supra*, at 1353.

[29] A summary of the progress of the bills and the debates in April, 1864, is found in Knox, *supra*, at 254-255.

The Senate version of the bill, introduced by Sherman on April 8 and referred to the Finance Committee, took the position of the Blaine amendment. The House bill and the Senate version with the committee amendments came to the Senate floor in late April. Floor debates on the interest provision did not begin until May 5. It is clear from that debate that in committee, or otherwise,[30] the proponents of a uniform rate had been defeated and had accepted that defeat. Sherman, the sponsor, stated:

> I should prefer a general uniform rate of interest, six or seven percent; but that has been found to be impracticable. . . . We found that the attempt to fix a uniform rate of interest would create so many disputes and rivalries and troubles that we finally had to yield that point.

Cong. Globe, *supra* at 2124.[31] The view which had prevailed was that expressed by Blaine and Cole in the House and reiterated by Trumbull of Illinois in the Senate debate:

> I think, if any good is to arise from these banking institutions [national banks], the law should be so formed that they may be established in all parts of the country; and it is no interference with State authorities, or with the authority of the different states to control this rate of interest. The State of Kansas may do it or the State of Iowa, or the State of Illinois, or any State, and there can

[30] Petitioner has been unable to locate any reports or minutes of the Finance Committee's deliberations in April, 1864.

[31] Sherman added later in the debate:

> My own preference . . . having been overruled. . ., I prefer now to place the national banks in each state on precisely the same footing with individuals and persons doing business in the State by its own laws.

Cong. Globe, *supra* at 2126.

> be no complaint by the people of these States if it is left to the control of their legislatures but the bill will be worthless in a large portion of the country if a uniform law rate of interest is fixed, and no banks will be established under it.

Cong. Globe, *supra* at 2124.

The Senate engaged in some discussion over which interest rate should apply to national banks in those Western states which allowed banks a rate different from the general rate.[32] Ultimately, it adopted the language of the Finance Committee subject to a proviso for those states with multiple rates.[33] The House approved the Senate version on May 24, 1864.

In brief, the uniform national rate failed because Congress believed that the loans of each national bank must be in parity with the rate of interest current in the bank's locality. Congress recognized that interest rates varied widely, particularly in the Western states, and that continued deference to local interest regulation was the means to parity. As noted earlier, Congress in 1864 could not have conceived of the precise matter at issue here because national banks were then confined to making loans at their home office. But had Congress contemplated a Nebraska national bank seeking to make consumer loans in Minnesota in competition with Minnesota banks, it

[32] This discussion is examined further, *infra*, at 32.

[33] The provision adopted read:

> That every association may take . . . interest at the rate allowed by the laws of the State or Territory where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized in any such State under this act. And when no rate is fixed by the laws of the State or Territory, the bank may take . . . a rate not exceeding seven per centum . . . .

Cong. Globe, *supra* at 2145.

would have desired the Nebraska bank to be in parity with the local market and thus subject to the interest regulation of Minnesota. Any suggestion that the Nebraska bank could avail itself of Nebraska rates in its business in Minnesota would have been rejected with the same reasoning employed by Cole of California in the House debate:

> What is the consistency or propriety of having two rates of interest established by law in the same community? What is the benefit of having two systems of usury in the same State?

Cong. Globe, *supra* at 1376.

Moreover, the suggestion that interest rates could be "exported" to another state by a national bank would have conflicted with the Congressional policy of promoting a uniform national currency by developing strong national banks in all parts of the nation. Congress would not have wanted a local national bank, bound by its home state's interest regulations, to suffer a competitive disadvantage because a national bank from a foreign state could compete in the local market with immunity from the state interest regulations governing the local bank.

D. Although The Court Below Felt Constrained to Follow The Rulings of The Seventh and Eighth Circuits in The Fisher Cases, The Reasoning of the Fisher Cases Is In Conflict With The Congressional Policy Behind Section 85 And Should Be Rejected.

The Minnesota Supreme Court recognized that the Minnesota Act was a non-discriminatory regulation which applied uniformly to all banks doing business in the state. (App. 168a) It also noted that permitting a Nebraska national bank to

export its home state's interest rates to Minnesota seemed "inconsistent with the original purposes of the [national] banking act and contrary to the expressed local interest of the state." (App. 169a). Nonetheless, it refused to consider the matter on a clean slate (App. 165a) and reluctantly followed the ruling in *Fisher v. First National Bank of Omaha,* 548 F.2d 255 (8th Cir. 1977) ("Fisher II"), allowing a national bank to export its home state's interest rates.

The Eighth Circuit ruling was an alternative holding presented without any analysis. The court first affirmed the district court's choice of law ruling in favor of the bank. 548 F.2d at 256-257.[34] The court then added that § 85 provided an additional basis for its ruling, citing the recent Seventh Circuit ruling in *Fisher v. First National Bank of Chicago,* ("Fisher I"), 538 F.2d 1284 (7th Cir. 1976), cert. denied 429 U.S. 1062 (1977).

The Seventh Circuit's *Fisher I* decision is the only reported decision offering any rationale for interpreting § 85 to allow a national bank to impose its home state's interest rates on loan transactions in another state.[35] The *Fisher I* rationale

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[34] Choice of law considerations have not been raised in this case and could have no bearing because the Minnesota legislature has clearly stated the law to govern the bank credit card agreements at issue.

[35] The only federal case to address the issue directly before Fisher I was Meadow Brook National Bank v. Recile, 302 F. Supp. 62 (E.D. La. 1969). The court considered the question one of first impression and concluded that § 85 did not authorize a New York national bank to charge on a Louisiana loan a rate of interest permitted under New York law but prohibited under Louisiana law. The court reasoned:

> We do not think Congress intended this provision to serve as a haven for national banks which, located in states with little or no restriction as to the interest rate, charge interest on loans made in other states in excess of that allowed by the laws of those states. This, too, would frustrate the congressional purpose of the equality between national and state banks regarding the interest rate.
>
> It might be suggested that had Congress intended this result,

cannot withstand analysis for it ignores both the Congressional intent behind § 85 and the practices of mid-nineteenth century banking. *Fisher I* addressed section 85 in two stages: Initially, it examined the first clause of § 85:

> Any association may . . . charge on any loan . . . interest at the rate allowed by the laws of the State . . . where the bank is located.

Then it looked to the effect of the second clause:

> except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter.

In discussing the first clause, the court refused to look beyond the "plain meaning" of the statute. It rejected the district court's view[36] and the holding in *Meadow Brook National*

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it could have readily been more explicit. The statute, however, was passed in 1864, over one hundred years ago, and we cannot believe that Congress foresaw, at that time, the financial fluidity which exists today. At that time, it was undoubtedly most unusual for a national bank to make a loan in a state other than the state where it was located. Even today, while it is not unusual, banks are hesitant to do so.

302 F. Supp. at 74. This holding is supported by dicta in two other federal decisions. Schumacher v. Lawrence, 108 F.2d 576 (6th Cir. 1940), and Haas v. Pittsburgh National Bank, 60 F.R.D. 604 (W.D. Pa. 1973).

[36] In an unreported opinion, the District Court for the Northern District of Illinois has stated:

> Although Section 85 is silent as to the permissible rate of interest on loans made to borrowers situated in states other than where the national bank is located, this Court feels that under such situations the permissible rate would be defined by the laws of the state in which the borrower is situated. However, a national bank making such a loan would retain its "most favored lender" status within the parameters of that state's laws.

Fisher v. First National Bank of Chicago, No. —— (N.D. Ill. June 13, 1975), quoted in Fisher I, *supra*, 538 F.2d at 1288.

Bank v. Recile, 302 F. Supp. 62 (E.D. La. 1969),[37] that § 85 was silent on the question. The court stated:

> We are not inclined to so twist the plain meaning of the statute. It clearly states that the interest on "any loan" is governed by the rate allowed "where the bank is located."

Fisher I, supra, 538 F.2d at 1290-1291.

Reliance on the "plain meaning" of a federal statute to the exclusion of its legislative background has been sharply criticized by this Court. "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *Train v. Colo. Pub. Int. Research Group*, 426 U.S. 1, 9-10 (1976). The argument for examining legislative history has even greater force in the present case because the banking system has been radically transformed from that which existed when the statute was enacted more than a century ago. An examination of the legislative background, as presented *supra*, would have revealed the error of this "plain meaning" interpretation. It would have disclosed that Congress could not have contemplated the export of interest rates of 1864 but that Congressional policy would oppose such export because it would be contrary to the stated objective of granting national banks an equal competitive basis in local markets.

The *Fisher I* analysis of the second clause of § 85, the exception for states with special bank rates, concludes that the "most favored lender" doctrine read into the clause by *Tiffany v. National Bank of Missouri*, 85 U.S. 409 (1873), would probably provide an additional ground for affirming the district

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[37] See n. 35, *supra*.

court. 538 F.2d at 1290. This analysis would not bear upon the present case[38] but for the court's observation on the phrase "or existing" in the exception clause:

> After Tiffany was decided the exception was amended by Congress to apply it not only to associations "organized in any such State," which would be redundant inasmuch as the first clause applies to the same state, that is, where the bank is located, but to apply the exception also to associations "organized or existing in any such State."[11] In this case the defendant bank appears to "exist" in Iowa, although in our view of the case we need not determine whether it does or not.

[11] The Tiffany language appeared in the National Bank Act of June 3, 1864, 13 Stat. 99 (so quoted by the Supreme Court as late as Farmers' and Mechanics' Bank v. Dearing, 91 U.S. 29, 31, 23 L.Ed. 196 (1875). The addition of "or existing" appeared shortly thereafter in the Revised Statutes of 1878 in § 5197 and seems to have been first so quoted in National Bank v. Johnson, 104 U.S. 271, 26 L.Ed. 742 (1881).

Fisher I, supra, 538 F.2d at 1291. The court suggests, without deciding, that the phrase "or existing" might provide further support for the view that § 85 sanctions export of interest rates by a national bank.

As *Fisher I* notes, the origins of the "or existing" phrase are not known. It appears to have been added sometime between the *Tiffany* decision in 1873 and the issuance of the Revised Statutes of 1878. In the 1870's, as in the 1860's, national banks were restricted to one location. See *Citizens and South-*

[38] Fisher I found that the law of the transaction state (Iowa) allowed certain lenders to charge the 18 percent rate permitted the Illinois national bank under its home state's laws. It observed that application of the most favored lender doctrine to Iowa law would permit any national bank to charge 18 percent on Iowa loans. The most favored lender doctrine is not asserted in the present case and the Fisher I analysis is pertinent only because of its dicta as to the "or existing" phrase in the exception clause.

ern National Bank v. Bougas, supra, —— U.S. ——, 98 S. Ct. at 93. Thus, contrary to *Fisher I*, the phrase does suggest Congressional recognition of a national bank operating outside its home state.

A more likely explanation of the phrase is to be found in the conversion of state chartered banks to national banks in the decade following the Civil War. During the war, there were very few conversions by state banks. From the enactment of the National Currency Act in February, 1863, to enactment of the National Bank Act in June 1864, only 20 of the 456 national banks chartered were conversions from state banks[39] However, when Congress imposed a 10% tax on state bank note issue in 1865,[40] state banks rushed to apply for national charters so that they could regain the status of banks of issue. By 1873, 88% of the nation's commercial banks were chartered under the national banking system.[41] These banks were allowed to maintain their state charters where possible.[42] Thus, the 1870's amendment of "organized in any such State under this chapter" to "organized or existing in any such State under this chapter" may represent Congressional recognition that by 1873 a large number of national banks were institutions which had originally been "organized" under state laws but subsequently had qualified for national bank status and were now "existing" in the national bank system.[43]

[39] Robertson, *The Comptroller and Bank Supervision*, *supra* at 47.
[40] Act of March 3, 1865, 13 Stat. 484.
[41] This percentage is derived from a Federal Reserve study set forth in Robertson, *supra*, at 67.
[42] Robertson, *supra*, at 54.
[43] An alternative explanation of the "or existing" phrase can be drawn from the exhaustion of authorized national bank circulation which took place after the Civil War. Robertson, *supra*, 57-61, explains that the $300 million limit on national bank note circulation authorized by the 1863 Act was reached by the late 1860's. The circulation was dominated by banks in the eastern and

Finally, *Fisher I* argues that the exception clause providing equality with state bank rates is redundant since the first clause, as interpreted by *Tiffany*, already provides national banks the highest rates available in a state. *Fisher I* is correct as to the redundancy but that observation sheds no light on the issue in the present case. At most, it shows that the *Tiffany* "most favored lender" doctrine was based on a misinterpretation of the legislative intent of § 30 of the 1864 Act. *Tiffany*, without analysis, cast aside the Congressional policy of national bank-state bank parity and, in doing so, rendered meaningless the exception clause. A more accurate reading of the Senate debates[44] would have shown that the bill's sponsor understood the first clause to be a restatement of § 46 of the 1863 Act which created parity with the general interest rate of each state;[45] that several senators from the high-interest Western states pointed out laws of their states allowing state bank rates higher than the general rates;[46] that an amendment was proposed on the floor to equate national

middle Atlantic states. Congress authorized an additional $54 million of notes in 1870. As Robertson states:

> Once again, the Southern and Western states failed to get their due. A decision of the Comptroller held that the new circulation had to be assigned to *banks with completed organizations*. Id. at 59 (Emphasis added).

This comment suggests that national banks in 1870 were divided into two classes: those with "completed organization" who were permitted to issue notes and those, primarily in the South and West, who were in some sense not complete and not permitted to issue notes. It is possible that the "or existing" phrase, which was enacted at this time, was a reference to the latter class of national banks. Since all restrictions on note issue were lifted in 1875, this classification of national banks most likely disappeared at that time and thus has received little attention.

[44] The debates appear in Cong. Globe, 38th Cong., 1st Sess. 2123-2127 (1864) and are discussed *infra* at 24.

[45] See comment of Sherman of Ohio confirming the view of Pomeroy of Kansas, Cong. Globe, *supra*, at 2125.

[46] See remarks of Grimes of Iowa, *id.* at 2123; Henderson of Missouri, *id.* at 2125; and Trumbull of Illinois, *id.* at 2126.

bank rates with state bank rates in those Western states;[47] that, with the single exception of Grimes of Iowa, all who spoke favored national bank-state bank equality; and that the final version which was worked out after the debate became mired in minor issues added the exception clause to assure parity in those Western states which had multiple interest rates.[48] For purposes of the present issue, the exception clause raised by the Circuit Court in *Fisher I* should be viewed as an expression of the Congressional policy of interest rate parity within a state between national banks and state banks. It cannot be presumed to speak to the present-day national system of bank credit cards. Neither in 1864 nor in the mid-1870's did Congress have in mind "a banking system that did not then exist."[49]

[47] Henderson's amendment, *id.* at 2125, 2127.

[48] These debates are discussed in Comment, 58 Iowa L. Rev. 1240 (1973), and in First National Bank in Mena v. Nowlin, 509 F.2d 872, 879-880 (8th Cir. 1975). The Comment provides useful background to the debates. However, its attempt to elevate the debate to a dramatic confrontation between the moneyed East and the developing West is not well founded. As noted *infra* at 21, the main issue as to interest was the uniform rate proposal. When that was resolved prior to the Senate debate, the only matter remaining was to draft the provision so as to assure that the consensus policy of strict national bank-state bank parity would govern in all the states, including the Western states such as Iowa with complex interest rate regulation.

[49] Citizens and Southern National Bank v. Bougas, —— U.S. ——, 98 S. Ct. 88, 93 (1977).

IV. THE POLICY OF COMPETITIVE EQUALITY AND THE SYSTEM OF DUAL REGULATION WOULD BE FURTHERED BY A DECISION UPHOLDING THE MINNESOTA ACT.

National banks are both public and private institutions. To some extent, they were created as instrumentalities of the federal government for certain specific federal purposes.[50] But, by and large, they are private institutions with a duty to their shareholders and a profit motive. Though chartered as national banks, the rule is that they are subject to state law unless the state law interferes with the purposes of their creation or their efficiency as a federal instrumentality, or is in direct conflict with a paramount United States law.[51]

The credit card business is not an area where a bank acts in its public capacity. It is strictly a private business. As a device for extending open-end credit to persons purchasing goods and services primarily in the state where they live and work, a credit card is obviously not a method for providing national currency nor marketing government loans. Thus, this is not a case where respondent's discharge of its so-called "public" function is in any way affected. Therefore, the only question is whether requiring a foreign national bank to abide by the same usury limit as a resident national bank is in conflict with a paramount federal policy.

As previously demonstrated, *supra*, Congress most likely intended that the disputed language in section 85 merely meant that national banks were to be bound by the same inter-

[50] They were created for the purpose of providing a currency for the whole country and a market for loans of the general government. Daggs v. Phoenix Nat'l Bank, 177 U.S. 549 (1900); Tiffany v. Nat'l Bank, 85 U.S. (18 Wall.) 409 (1873).

[51] First Nat'l Bank in St. Louis v. Missouri, 263 U.S. 640 (1924).

est limits as applied to the local banks doing business in the same place. Consistent with this interpretation are the holdings of several federal courts in a closely analogous area. In *Alden's, Inc. v. Ryan*, 571 F.2d 1159 (10th Cir., 1978); *Alden's, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir.) *cert. denied*, 46 U.S.L.W. 3220 (October 4, 1977); and *Alden's, Inc. v. Packel*, 524 F.2d 38 (3rd Cir.), *cert. denied*, 425 U.S. 943 (1975), it was uniformly held that retailers, whether local or interstate in nature, are governed by a state's local interest rate when extending credit on credit card transactions. Thus, it appears obvious that there is, in effect, a national policy as to which interest rate should apply to open-end credit card transactions, and it is that which is espoused by petitioners. Conversely, it serves no public or commercial policy to enable a foreign national bank to destroy competitive equality and unfairly capture the credit card business within the state of Minnesota.[52]

In exercising its police powers to enact Minn. Stat. § 48.185, the Minnesota legislature has determined that an effective interest rate of 12% should prevail on bank credit card transactions within the state of Minnesota. It allows for an annual $15 fee to be charged in addition to the interest rate. This is Minnesota's sovereign determination as to the limit of interest its citizens should have to bear for the every-day necessity of consumer credit. Nebraska has declared its citizens need the protection of an 18% effective interest rate on credit card transactions, but its law does not provide for the $15 yearly charge. Each state has exercised its police powers and declared

[52] Being able to charge a full 6% more interest enables respondent to advertise its credit card as "free," while a national bank located in Minnesota which is marketing the same credit card is limited to a smaller interest rate and, thus, must charge a service fee in addition. Thus, it cannot advertise its card as "free."

its public policy regarding usury limits. When Nebraska was passing its law, its legislators were concerned with its local businesses and the citizens of Nebraska. They did not have the mandate or motivation to consider the oft-times competing needs of citizens of other states when enacting Nebraska law.

It is with the awareness that each state legislature is limited to exercising its sovereign powers for the benefit of its own citizens and others doing business within its borders that Congress entrusted to each state the power to set usury limits. In 1864, when Congress deferred to the exercise of local police powers in setting interest rates, it did not intend to allow national banks to export one state's interest rates into another. Legislative history demonstrates that Congress understood national banks to be confined in their loan transactions to the locality of their home office and wanted competitive equality within each local market for national banks, an equality that could not exist if a foreign national bank could escape an interest limit that applied to all local banks in the area.

This Court can effectuate the public policy of the states and the Congress by construing section 85 to mean that all banks doing business in a state are governed by the local usury limit. This construction would effectuate the desirable goal of competitive equality. Nebraska national banks would compete on the same terms in Minnesota as Minnesota national and state banks. Similarly, national banks from jurisdictions other than Nebraska, including those from Minnesota, would be bound by Nebraska's laws when soliciting loans in Nebraska. Moreover, the uniformity within each state resulting from such construction would free the citizens of each state from the confusion and uncertainty which would exist under the ruling below as to the costs of purchasing open-end credit. To allow otherwise would have the potentially anomalous result of allowing 49 other states to impose their usury statutes upon the citizens of Minnesota.

V. PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI WAS TIMELY FILED.

In its order granting and consolidating the petitions of the State of Minnesota and The Marquette National Bank for writs of certiorari, the Court directed that the parties brief and argue the jurisdictional issue as to whether the petitions were filed within the time permitted by law.[53]

Pursuant to 28 U.S.C. §2101(c) (1970), the time for application to this Court for a writ of certiorari to review a judgment or decree of a state court in a civil action is limited to "ninety days *after the entry of such judgment* or decree."[54] (Emphasis added.) It is important to note, therefore, that the Act of Congress which defines this Court's jurisdiction to entertain petitions for writs of certiorari specifies that it is from the date of entry of judgment that the period within which application for a writ must be made begins to run.[55] The decisions of this Court have further established that it is only a "final judgment" which may be reviewed upon writ of certiorari.[56]

Final judgment in this matter was entered in the Minnesota Supreme Court on December 14, 1977, from which date the period to seek review by this Court commenced to run.

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[53] Order dated May 22, 1978, granting petitions for writs of certiorari in Nos. 77-1258 and 77-1265.

[54] "App. at ——" (Emphasis added).

[55] Rule 22(3) of this Court specifies that a petition for a writ of certiorari in cases such as the instant one are deemed to be timely "when filed with the clerk within the time prescribed by law."

[56] *See, e.g.*, Costarelli v. Massachusetts, 421 U.S. 193 (1975). *See generally*, Annot., 29 L. Ed. 2d 872 (1971).

The Minnesota Supreme Court handed down its opinion in this matter on November 10, 1977.[57] However, in accordance with the Rules of the Minnesota Supreme Court, judgment could not be entered upon the Court's opinion until ten days after filing of the decision.[58] The Rules further provide that the filing of a petition for rehearing operates to stay the entry of judgment.[59]

On November 21, 1977, a petition for rehearing was filed with the Minnesota Supreme Court, thereby staying the entry of final judgment.[60] The petition was denied by order of December 8, 1977, whereupon the final judgment of the Minnesota Supreme Court was entered by the Clerk of Court on December 14, 1977.[61] Therefore, as the final judgment of the Minnesota court was not entered until December 14, 1977, it is from that date that the 90 day period to seek review by this Court must be computed within the meaning on the face of 28 U.S.C. § 2101(c) (1970).[62]

Respondent First of Omaha Service Corporation asserts, however, that it is from the date that the Minnesota Supreme Court issued its opinion, rather than from the date of judgment, that the time period for seeking a writ of certiorari must be computed. If respondent's assertion was correct, the petitions of appellants, filed on March 13, 1978, would be untimely

[57] App. 155a.
[58] Rule 136.02, Minn. R. Civ. App. P.
[59] *Id.*; Rule 140, Minn. R. Civ. App. P.
[60] App. 172a. *See, e.g.*, Chicago Great W. R.R. v. Basham, 249 U.S. 164 (1919).
[61] App. 198a.
[62] As was noted by petitioner, the Marquette National Bank, in its Reply in Support of Certiorari, the procedure on rehearing in the Minnesota Supreme Court, which operates to stay entry of judgment pending a decision of the petition, is in sharp contrast to the procedure under Rules 36 and 40, Federal Rules of Appellate Procedure, which provide for entry of judgment by the clerk upon receipt of the Court's opinion and for the filing of a petition for rehearing within 14 days after entry of judgment.

and subject to dismissal for want of jurisdiction in this Court.[63] The decisions of this Court have established, however, that where state law or local practice provides that judgment shall not be entered until after a petition for rehearing by an appellate court has been decided, the time for application for a writ of certiorari runs from the date that judgment is entered in the appellate court. In *Puget Sound Power & Light Co. v. King County,*[64] this Court was asked to review, upon the former writ of error, a July 10, 1922, judgment of the Washington Supreme Court. On October 15, 1921, a department of the Washington Supreme Court, which sits in two departments and en banc, filed its opinion. Washington law provides, by statute, that a decision of a department of the Washington Supreme Court does not become final until 30 days after it is filed, unless a petition for rehearing before the Court en banc is filed. If such a petition is filed and rehearing is permitted, the decision becomes final upon filing of the decision of the Court en banc. It is provided, however, that where a decision becomes final, a judgment shall issue thereon.

Upon rehearing in the *Puget Sound* case, the Washington Supreme Court en banc filed its opinion on June 12, 1922. On July 10, 1922, judgment affirming the decision of the lower court and awarding costs was entered on the minutes of the Court. A writ of error was sought on September 22, 1922. At the time of decision, the statutes provided that a writ of error must be applied for within three months after entry of the

[63] On March 18, 1978, respondent submitted a motion requesting the Minnesota Supreme Court to lift its stay of judgment pending disposition in this Court on the same grounds—the petition for certiorari was not timely filed. The Minnesota Supreme Court denied the respondent's motion by order of April 10, 1978. App. 204a
[64] 264 U.S. 22 (1924).

judgment or decree of which review is sought.[65] This Court was, therefore, squarely faced with the question of whether the Washington Court's decision of June 12 or judgment of July 10 constituted the "judgment" from which Congress intended the appeal time to run. In writing for a unanimous Court, Mr. Chief Justice Taft observed:

> It is apparent that however final the decision may be, it is not the judgment. It is said that the latter is a mere formal ministerial entry of a clerical character, whereas the real judgment is the final decision. Whatever the effect of the distinction in the procedure of the State, which counsesl seek to make, we are in no doubt that that which the Washington statute calls the judgment is the judgment referred to in the Act of Congress . . . fixing the time within which writs of error must be applied for and allowed.[66]

The petition was, therefore, held to have been timely filed. *Accord, Comm'r v. Estate of Bedford*, 325 U.S. 283 (1945).

The decisions of this Court clearly establish that where state law or local rule contemplates not only the delivery of an opinion but the formal entry of judgment in the appellate court, it is from the date of such *judgment* that the time to seek review in this Court begins to run.[67] As the Minnesota Supreme Court's rules plainly contemplate the entry of a judgment after a petition for rehearing has been determined,[68] it is

[65] Act of September 6, 1916, ch. 448, § 6, 39 Stat. 727.

[66] Puget Sound Power & Light Co. v. County of King, 264 U.S. 22, 25 (1924).

[67] As one commentary on this Court's appellate jurisdiction has observed, "The most elementary component of the final judgment requirement is that there must be a judgment." *C. Wright, A. Miller, E. Cooper & E. Gressman*, 16 *Federal Practice and Procedure*, § 4009 p. 569 (1977).

[68] Rules 36 and 40, Minnesota Rules of Civil Appellate Procedure.

from that judgment that a writ of certiorari must be sought.[69]

Respondent First of Omaha Service Corporation, however, in its Brief of Respondent in Opposition to Petition for Writ of Certiorari, cites several prior decisions of this Court for the proposition that filing of the Minnesota Supreme Court's Order denying rehearing on December 8, 1977, six days prior to the entry of the Court's judgment, was the last act to be taken in that court and, therefore, constitutes the final judgment of the Minnesota Court. These decisions, however, all presuppose the existence of a valid judgment below, and turn on the question of whether that judgment has become final for purposes of review in this Court. Therefore, none of the decisions cited by respondent are in point for the simple reason that at the time the Minnesota Court acted on the petition for rehearing, no judgment of that Court had ever been entered.[70] Respondent has thus confused the question of finality of the Minnesota Supreme Court's judgment with the threshold question of when judgment was entered in that court

[69] For a general discussion of U. S. Supreme Court Rule 22, governing the time requirements for filing a petition for writs of certiorari, see Annot., 28 L. Ed. 2d 960 (1971).

[70] Citizens' Bank v. Opperman, 249 U.S. 448 (1919) is inapposite as the state appellate court's judgment therein has been entered prior to the filing of a petition for rehearing. Denial of the petition was, therefore, properly held to have rendered the judgment final for purposes of review by this Court. Department of Banking v. Pink, 317 U.S 264 (1942), is also of no help to respondent. That case stands for the proposition that where a final judgment of an appellate court contemplates a remand to a lower court to perform the ministerial act of entering judgment *in the lower court*, the time to seek review runs from the date of judgment in the appellate court and not the date of judgment upon remand. The Pink case is, therefore, consistent with this Court's holdings in Puget Sound and Estate of Bedford that the time period for review runs from the date of judgment in the appellate court. Other cases cited by respondent, which involve appeals from an administrative decision and in two criminal matters, are factually and procedurally dissimilar to the instant case. United States v. Healy, 376 U.S. 75 (1964) and Forman v. United States, 361 U.S. 416 (1960) (petition for rehearing in criminal case stays finality

for purposes of 28 U.S.C. § 2101(c) (1970).[71] Had the appellants followed respondent's reasoning and sought review of the opinion of the Minnesota Supreme Court in the absence of entry of judgment, this Court could have properly dismissed the petition for writ for failure of the record to reflect entry of judgment.[72]

The rules of the Minnesota Supreme Court clearly contemplate that judgment shall be entered in that Court upon the Court's opinion. This Court has previously held that where local rule or procedure contemplates the formal entry of judgment in the highest court below in which review can be obtained, it is from the date of that judgment and not from the date of the court's opinion that the time period to apply for a writ of certiorari must be computed. As the Minnesota Supreme Court's judgment was entered on December 14, 1978, it is from that date the 90 days to seek review must be counted. The petitions for certiorari were, therefore, timely filed, and this Court has jurisdiction to review the Minnesota Supreme Court's judgment on the merits.

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of judgment entered); Pfister v. Northern Illinois Finance Co., 317 U.S. 144 (1942) (an untimely petition for rehearing before an administrative agency which is not considered on the merits will not alter the time for appeal).

[71] Neither respondent nor appellants dispute the fact that the Minnesota Supreme Court's judgment is a final judgment for purposes of review by this Court. *See* Brief of Respondent in Opposition to Petition for Writ of Certiorari at 5-6.

[72] National Life Insurance Co. v. Scheffer, 131 U.S. cciii (1882) (where record before Supreme Court shows verdict and motion for new trial but no judgment on verdict, writ of error must be dismissed). It should be noted that respondent cannot argue prejudice due to the clerk's delay in entry of judgment in the Minnesota Supreme Court inasmuch as judgment was entered promptly. Furthermore, the Minnesota procedural rules create no potential for prejudice by delay in the entry of judgment, as Minnesota law permits either the prevailing or the losing party to compel entry of judgment in the Minnesota Supreme Court. See D. M. Osborne & Co. v. Paulson, 37 Minn. 46, 33 N.W. 12 (1887).

CONCLUSION

Congress could not have contemplated the modern bank credit card system when it enacted the interest rate provision of § 85 of the National Bank Act in 1864. The Congressional policy evident in the debates on § 85 is to assure competitive equality in each locality between national banks and other lenders. When applied in the modern context of a foreign national bank entering another state to solicit bank credit card accounts, this policy requires that § 85 be construed as incorporating the interest rate of that state.

Based on the foregoing, this Court should reverse the decision of the Supreme Court of Minnesota and order it to reinstate the judgment of the district court granting partial summary judgment against the respondent.

Respectfully submitted,

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ADDENDUM

12 U.S.C. § 85. Rate of interest on loans, discounts and purchases.

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance,

reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, unsular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

As amended Oct. 29, 1974, Pub. L. 93-501, Title II, § 201, 88 Stat. 1558.

Minn. Stat. 48.185 OPEN END LOAN ACCOUNT ARRANGEMENTS. Subdivision 1. Any bank organized under the laws of this state, any national banking association doing business in this state, and any savings bank organized and operated pursuant to chapter 50, may extend credit through an open end loan account arrangement with a debtor, pursuant to which the debtor may obtain loans from time to time by cash advances, purchase or satisfaction of the obligations of the debtor incurred pursuant to a credit card plan, or otherwise under a credit card or overdraft checking plan.

Subd. 2. No bank shall extend credit which would cause the total outstanding balance of the debtor on accounts created pursuant to the authority of this section to exceed $7,500. No savings bank shall extend credit which would cause the outstanding balance of the debtor to exceed $5,000, nor shall it extend such credit for any purposes other than personal, family, or household purposes, nor shall it extend such credit to any person other than a natural person.

Subd. 3. A bank or savings bank may collect a periodic rate of finance charge in connection with extensions of credit pursuant to this section, which rate does not exceed one percent per month computed on an amount no greater than the average daily balance of the account during each monthly billing cycle. If the billing cycle is other than monthly, the maximum finance charge for that billing cycle shall be that percentage which bears the same relation to one percent as the number of days in the billing cycle bears to 30.

Subd. 4. No charges other than those provided for in subdivision 3 shall be made directly or indirectly for any credit extended under the authority of this section, except that there may be charged to the debtor:

(a) Annual charges, not to exceed $15 per annum, payable in advance, for the privilege of using a bank credit card which entitled the debtor to purchase goods or services from merchants, under an arrangement pursuant to which the debts resulting from the purchases are paid or satisfied by the bank or savings bank and charged to the debtor's open end loan account with the bank or savings bank;

(b) Charges for premiums on credit life and credit accident and health insurance if:

(1) The insurance is not required by the bank or savings bank and this fact is clearly disclosed in writing to the debtor; and

(2) The debtor is notified in writing of the cost of the insurance and affirmatively elects, in writing, to purchase the insurance.

Subd. 5. If the balance in a revolving loan account under a credit card plan is attributable solely to purchases of goods or services charged to the account during one billing cycle, and the account is paid in full before the due date of the first state-

ment issued after the end of that billing cycle, no finance charge shall be charged on that balance.

Subd. 6. This section shall apply to all open end credit transactions of a bank or savings bank in extending credit under an open end loan account or other open end credit arrangement to persons who are residents of this state, if the bank or savings bank induces such persons to enter into such arrangements by a continuous and systematic solicitation either personally or by an agent or by mail, and retail merchants and banks or savings banks within this state are contractually bound to honor credit cards issued by the bank or savings bank, and the goods, services and loans are delivered or furnished in this state and payment is made from this state. A term of a writing or credit card device executed or signed by a person to evidence an open end credit arrangement specifying:

(a) that the law of another state shall apply;

(b) that the person consents to the jurisdiction of another state; and

(c) which fixes venue;

is invalid with respect to open end credit transactions to which this section applies. An open end credit arrangement made in another state with a person who was a resident of that state when the open end credit arrangement was made is valid and enforceable in this state according to its terms to the extent that it is valid and enforceable under the laws of the state applicable to the transaction.

Subd. 7. Any bank or savings bank extending credit in compliance with the provisions of this section, which is injured competitively by violations of this section by another bank or savings bank, may institute a civil action in the district court of this state against that bank or savings bank for an injunc-

tion prohibiting any violation of this section. The court, upon proper proof that the defendant has engaged in any practice in violation of this section, may enjoin the future commission of that practice. Proof of monetary damage or loss of profits shall not be required. Costs and attorneys' fees may be allowed to the plaintiff, unless the court directs otherwise. The relief provided in this subdivision is in addition to remedies otherwise available against the same conduct under the common law or statutes of this state.

Service of process shall be as in any other civil suit, except that if a defendant in the action is a foreign corporation or a national banking association with its principal place of business in another state, service of process may also be made by personal service outside the state, or in the manner provided by section 303.13, subdivision 1, clause (3), or in such manner as the court may direct. Process is valid if it satisfies the requirements of due process of law, whether or not defendant is doing business in Minnesota regularly or habitually.

[*1976 c 196 s 5*]